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No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Advocates for Human Rights

The Advocates for Human Rights is a non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides *pro bono* legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construes legal protections for refugees in a way that is consistent with international human rights standards and that does not leave actual victims of persecution outside its reach.

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this amicus curiae brief, and their written letters of consent accompany it for filing with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, the amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's "objective effects" test used to determine whether an asylum applicant "assisted" persecution clashes with this Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981) because it does not allow for nuanced line-drawing between the victims and perpetrators of persecution. According to *Fedorenko*, the Displaced Persons Act of 1948 (DPA)—although on its face excluding from the United States *all* persons who assisted Nazi persecution—did not compel treating demonstrably innocent holocaust survivors who were forced to labor in concentration camps as "assistants" in the persecution of their fellow prisoners. Although this may seem obvious, in key footnote number 34, Justice Marshall acknowledged that future cases might present "difficult line-drawing problems" requiring close analysis of whether the particular conduct of apparent victims crossed the line into "assisting" persecution.

Lower courts have since disagreed about the meaning of footnote 34. The Fifth Circuit reads *Fedorenko* to measure assistance by the "objective effects" of the particular conduct in question and prohibits consideration of voluntariness, intent, or other factors going to personal moral culpability. Other courts take the opposite view and engage in a searching evaluation to determine whether an individual's conduct demonstrates personal culpability to the degree it may be fairly deemed assistance.

The DPA provisions concerning assistance to persecution shed light on *Fedorenko's* famous footnote. When Congress passed the DPA, it lifted the definition of "displaced person" from Annex I of the Constitution of the International Refugee Organization (IRO). Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009, 3037–55 (1948). The overarching purpose of the IRO constitution was to identify *bona fide* refugees and displaced persons, carefully distinguishing them from undeserving persecutors and other war criminals or traitors. The IRO constitution identified Jewish concentration camp survivors as victims of Nazi persecution and specified that the labor the Nazis forced them to perform in the camps did not render them "persecutors," but rather could qualify them as displaced persons. In other words, absent extraordinary evidence of individual culpability, the IRO's categorical exclusion for those who "assisted" the persecution of civilians *did not* apply to Jewish concentration camp survivors who were victimized through forced labor. Clearly, then, the DPA did not measure assistance solely by an "objective effects" standard.

The Board of Immigration Appeals (BIA) decisions that first endorsed the "objective effects" test rest on fundamental errors of logic and interpretation. A close reading of *Fedorenko*—from which the BIA holdings derive—demonstrates that the Court's holding actually turned on evidence of Fedor Fedorenko's personal culpability, including evidence this his actions as an armed guard were

voluntary to a meaningful degree. For years, lower courts applying *Fedorenko* in Nazi deportation and denaturalization cases had no occasion to clarify footnote 34 because almost all of these cases involved conduct by Nazi persecutors and collaborators that—without question—established personal culpability. But, as more courts are recognizing, asylum claims present the difficult line-drawing problems *Fedorenko* anticipated.

Given the statutory differences between the DPA and the asylum and withholding of removal provisions of the Immigration and Nationality Act (INA), it is highly questionable whether *Fedorenko* applies to this case at all. But if *Fedorenko* holds some relevance in asylum cases, this Court should reject the Fifth Circuit's unsupportable "objective effects" test as contrary to established precedent. By adopting a narrow view of *Fedorenko* and refusing to consider evidence of individual culpability, the Fifth Circuit permits unjust, inequitable results in hard cases and exhibits a disturbing indifference toward the victims of persecution our asylum laws were meant to protect.

This Court should instead articulate and adopt a standard of assistance to persecution that turns on individual culpability because asylum claims will continue to present the difficult line-drawing problems that litigation over Nazi persecution almost never did. *Fedorenko* and subsequent lower court decisions point to a number of important factors that courts should consider when assessing whether an individual's particular conduct assisted

persecution. These include voluntariness, shared persecutory motive, membership in the persecuting organization, the directness or indirectness of involvement in acts of persecution, knowledge, and redemptive acts.

ARGUMENT

I. CIRCUIT COURTS OFFER COMPETING INTERPRETATIONS OF *FEDORENKO*

Fedorenko held that the DPA "made *all* those who assisted in the persecution of civilians ineligible for visas [to the United States]," and that because the specific DPA provision targeting persons who assisted Nazi persecution contained no "voluntariness requirement," "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made [Fedorenko] ineligible for a visa." 449 U.S. at 512 (emphasis added). Because Nazis forced Jewish prisoners to labor in the same camps where guards like Fedorenko served, this Court acknowledged that without a categorical exception for involuntary assistance the DPA might be read to deny visas to Jewish death camp survivors along with the armed guards who imprisoned them. *Id.* at 511 n. 33.

In footnote 34, Justice Marshall offered a "solution" to this concern, explaining that in certain cases courts might have to resolve "difficult line-drawing problems" so as to distinguish those truly responsible for assisting Nazi persecution from those who were innocent victims of it. *Id.* at 512 n. 34.

Footnote 34 described drawing lines along a continuum, "focusing on whether particular conduct can be considered assisting in the *persecution* of others." *Id.* At one end of the continuum was the Jewish prisoner "who did nothing more than cut the hair of female inmates before they were executed," and at the far opposite end was Fedorenko, "who was issued a uniform and armed with a rifle and pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp[.]" *Id.* Justice Marshall did not elaborate on the nuances of the line-drawing test, both because the case did not present a "difficult line-drawing problem," and, it seems likely, because this Court understood that the United States had not and would not treat Jewish death camp survivors as assistants to their own Nazi persecutors.

Few of the many reported cases involving persons accused of assisting Nazi persecution have presented difficult line-drawing problems. See Section III.D *infra*. But hard questions about assistance do arise with some frequency in the distinct context of asylum claims. Courts have looked to *Fedorenko* in the asylum context, but disagree about the meaning of footnote 34 and the type of evidence they must consider. The Fifth Circuit reads *Fedorenko* to impose a narrow "objective effects" standard, whereby courts evaluate an individual's particular conduct from a purely objective standpoint and only to determine whether it in fact furthered acts of persecution. *See Bah v. Ashcroft*, 341 F.3d 348, 351

(5th Cir. 2003). Under this strict liability approach, evidence of voluntariness, subjective intent, and other factors going to the individual's moral culpability are irrelevant. *Id.* Other courts, looking to the specific evidence Justice Marshall weighed in Fedorenko's case, have come to the opposite conclusion and engage in a particularized evaluation to determine whether, given the totality of circumstances, an individual's conduct is personally culpable to the degree it may be fairly deemed assistance. *See Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004); *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir 2001). Those other courts that do not explicitly take voluntariness into account still cast the determination of whether one assisted in persecution as a question of personal culpability. *See, e.g.*, *Chen v. United States*, 513 F.3d 1225, 1259 (11th Cir. 2008); *Ofusu v. McElroy*, 98 F.3d 694, 701 (2d Cir. 1996).

Both the DPA and this Court's *Fedorenko* decision support a personal culpability test as identified by the majority of Circuits. The Fifth Circuit's "objective effects" test, which runs counter to the DPA and *Fedorenko*, should be rejected.

II. THE DPA DID NOT ADOPT AN OBJECTIVE EFFECTS STANDARD.

A. The DPA and the International Refugee Organization

Congress passed the DPA in 1948 so that certain Europeans who remained displaced after World War

II could resettle in America in larger numbers than existing visa quotas allowed. 62 Stat 1009. In 1946, member states of the United Nations, led by the United States, established the IRO as a temporary agency to protect, repatriate, and resettle an unprecedented number of war refugees and displaced persons. *See* L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations: Its History and Work 1946 - 1952* 1-54 (1956).[2] By 1948, the IRO had helped repatriate or resettle millions of people, but many hundreds of thousands still remained in its camps. Pressure for legislation that would help empty the camps mounted. The unassimilated refugee population was considered a serious obstacle to the Marshall plan and its goal of achieving stability in post-war Europe. 94 Cong. Rec. H3523 (daily ed. Mar. 25, 1948) (statement of Rep. Chelf); 94 Cong. Rec. H7739 (daily ed. June 10, 1948) (statement of Rep. Fellows). The United States had assumed responsibility for the largest share of the IRO's operating budget, requiring Congress to appropriate over $70,000,000 each year. 94 Cong. Rec. H7739 (daily ed. June 10, 1948) (statement of Rep. Fellows). In addition, coalitions of religious and social service organizations had organized to lobby Congress for a generous, humanitarian response. 94 Cong. Rec. S6586-87 (daily ed. May 27, 1948); 94 Cong. Rec. A1601-02.

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[2] The *Fedorenko* Court looked to Holborn's comprehensive history of the IRO. 449 U.S. at 495 n. 5.

When Congress began to debate competing bills in early 1948, the IRO counted 611,071 displaced persons living inside its camps with another 225,918 subsisting in communities surrounding them. 94 Cong. Rec. S6567 (daily ed. May 27, 1948) (statement of Sen. Ferguson). The Jewish population made up about 23% of this total. Most of the Jews were holocaust survivors who had attempted to resettle in Poland and other eastern European countries following the war, but later fled renewed anti-Semitic violence. *Id.* at S6806 (daily ed. June 1, 1948); 94 Cong. Rec. H8861 (daily ed. June 18, 1948) (statement of Rep. Celler).

The final DPA legislation provided just over 200,000 special visas to be issued to "eligible displaced persons" over a two-year period. 62 Stat. 1009. Congress lifted its definition of "displaced person" from the text of the IRO constitution, defining "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." *Id.*

B. The DPA Definition of "Displaced Person"

The IRO constitution was drafted in accordance with the UN General Assembly resolution of February 12, 1946, which set forth key principles for the repatriation or resettlement of war refugees and displaced persons. *See* Annex III, IRO Constitution, 62 Stat. 3037, 3054; Holborn, *supra*, at 29-39. UN

member nations debated these principles at length before unanimously adopting the resolution, and its terms reflect a delicate compromise between western democracies that favored broad resettlement opportunities for the displaced, including political dissidents, and Soviet bloc nations that preferred narrower terms that would tend to repatriate more of their citizens. *Id.* The resolution identified as its overarching concern, "the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and ... war criminals, quislings, and traitors ... on the other," the same concern this Court faces here. *Id.*

Annex I of the IRO constitution highlighted this same dichotomy between deserving war victims and undeserving war criminals, embedding it in a complex set of rules that defined eligibility for IRO assistance. 62 Stat. 3051-52. The Annex is organized under three main headings. The first is titled "General Principles." This is followed by Part I, which has four sections A-D. Part I, sections A and B provide the technical definitions of "refugees" and "displaced persons." Part I, section C describes the conditions under which refugees and displaced persons would be deemed "of concern" to the IRO so as to qualify for assistance, while Part I, section D describes the separate conditions that could cause a refugee or displaced person "of concern" to the IRO to then lose that status. Finally, Part II lists the categorical grounds of exclusion that describe "Persons who will not be the Concern of the Organization."

In practice, an applicant for IRO assistance had to pass a three-stage test. First, he had to show he was either a "refugee" or "displaced person." *International Refugee Organization, Manual for Eligibility Officers* No. 241, ch. I, p. 5 (undated, circulated in 1950) (IRO Manual).[3] Second, he could not be categorically excluded by the provisions of Part II. *Id.* Passing these first two stages qualified an applicant as a *bona fide* refugee or displaced person, but he would still have to prove under Part I, Section C that he had "valid objections" to returning to his country of origin (*e.g.*, persecution, valid political opposition to the home government, or compelling humanitarian concerns). *Id.* Only then did the applicant become "of concern" to the IRO and receive assistance. *Id.*

The "General Principles" prefacing Annex I provide that all Annex terms are to be applied in an *equitable* manner. 62 Stat. 3051. Indeed, "[t]he main object of the Organization will be to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons, which shall be *just and equitable* to all concerned." *Id.* (emphasis added); IRO Manual, ch. II, p. 8. The final paragraph reiterates the same need to "ensure the impartial and equitable application" of the Annex's eligibility provisions in individual cases. 62 Stat. 3051. The General Principles section is not

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[3] The manual provided officers who screened applicants in the camps authoritative commentary to the IRO Constitution and its Annexes. Holborn, *supra*, at 207. The Manual has been cited by this Court in past cases interpreting the text of Annex I. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 n. 20 (1987)

mere window dressing. The listed principles, including those emphasizing equity, "constitute an integral part of the definitions as laid down in Parts I and II of this Annex." 62 Stat. 3051.

The definition of "refugee" at Part I, section A, and the definition of "displaced person" at Part I, section B, both apply to "victims of the Nazi or fascist regimes" and, therefore, generally describe the Jewish survivors of Nazi death camps. 62 Stat. 3051-52; IRO Manual, ch. III, pp. 14-15, 20-21, ch. XXIII, pp. 100-03. Part I, section A, paragraph 3 explicitly refers to certain "victims of Nazi persecution of Jewish origin," and Part I, section A, paragraph I(c) was crafted to encompass large numbers of Jews who had become refugees due to Nazi persecution before the outbreak of the second world war. 62 Stat. 3051-52; IRO Manual, ch. III, pp. 15-19; Holborn, *supra*, at 174-75. Further, the definition of "displaced person" includes a victim of the Nazi regime who, "has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as *persons who were compelled to undertake forced labour* or who were deported for racial, religious, or political reasons." 62 Stat. at 3051–52 (emphasis added); IRO Manual, ch. III, pp. 20-21. The text of the Annex not only identifies Jewish concentration camp survivors as war victims in general terms, but further specifies that the labor Nazis forced them to perform in the camps was integral to the persecution they suffered and could itself qualify them as "displaced persons."

A person meeting the definition of "refugee" or "displaced person" could never be "of concern" to the IRO if he also fell within any of the categorical grounds of exclusion at Part II of the Annex. The first two of these grounds were:

> 1. War criminals, quislings, and traitors.
>
> 2. Any other persons who can be shown:
>
> (a) To have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations.[1]

[1] Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of a territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered

> except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld.

62 Stat. 3037, 3051-52 (footnote in original). The categorical exclusions of Part II must be read in light of the rest of the Annex, including the various provisions discussed above. These establish that (1) all terms of the Annex including the phrase "assisted the enemy in persecuting civil populations" were construed equitably so to assure just outcomes in particular cases; (2) the overall purpose of the Annex was to separate innocent war victims from guilty war criminals; (3) Jewish concentration camp survivors were war victims in both general and specific terms; and (4) the labor Jewish victims were forced to provide in concentration camps was an important aspect of their persecution that could qualify them for IRO protection. Taken together, these aspects of the Annex text give rise to the heavy presumption that the forced labor of Jewish concentration camp victims was *not* assistance to Nazi persecution. The equitable terms of the Annex rule out a strict-liability interpretation of Part II, Section 2(a), and so the question of whether a particular Jewish concentration camp prisoner had "assisted" Nazi persecution, if it ever arose[4], could

[4] The text of Part II, sections 1 and 2(a), and especially the IRO Manual, cast serious doubt upon whether the exclusion at section 2 for "other persons who can be shown ... to have assisted the enemy in persecuting civil populations" was ever applicable to the conduct of camp inmates in the way

Fedorenko presumed. Section 1 excludes "war criminals, quislings, and traitors," and the words "other persons who . . . assisted the enemy" that immediately follow also appear to target persons whose conduct would be prosecuted as war crimes. The IRO Manual confirms this in its notably brief commentary to section 2(a):

> 17. The guiding rules laid down in respect of war criminals apply also to the above; their names are usually included in the United Nations War Crimes Commission's lists.

IRO Manual, ch. 6, p. 33. The Manual goes on to instruct Eligibility Officers, when credible evidence of guilt of persecution is presented, to withhold determination and consult with higher authorities. *Id.* The Eligibility Officer was not himself vested with the authority to make a determination of whether the applicant was a war criminal, quisling or traitor subject to the exclusion clause. *Id.* Presumably, the credible evidence in the Eligibility Officer's possession, once conveyed to higher authorities with the resources sufficient for a criminal investigation, could then be investigated and, if charges were lodged, a determination of ineligibility for protection could be made. *Id.*

The Manual elsewhere discusses the arguably persecutory conduct that certain Jewish concentration camp prisoners engaged in to maintain discipline for the Nazis:

> [T]he prisoners were selected to keep "discipline and order" and frequently they committed more atrocities than the S.S. Guards in the camp. The commonest type of disciplinary office holders in the camps were the professional criminals . . . [I]n each camp there was a camp senior or Lageralteste (or Capo) responsible to the S.S. for the discipline of the camp.

IRO Manual, ch. XXIII, pp. 101-02. The Manual's characterization of the Capos' conduct is highly controversial. *See Fedorenko*, 449 U.S. 532 n. 2 (Stevens, J., dissenting).

not be resolved merely by reference to the "objective effects" of his forced labor.

The footnote to Part II, Section 2, is somewhat ambiguous, but at a minimum it reinforces the important general principle that the entire Annex text must be applied in a just and equitable manner.[5] While the note refers to "voluntary assistance," not simply "assistance," it nonetheless shades the meaning of both subsections 2(a) and 2(b), because only subsection 2(a) refers to "civil populations." The important implication here is that voluntariness and subjective purpose are generally relevant to the concept of assistance. Therefore, the most logical reading of 2(a) in light of 2(b) *and* the footnote *and* the rest of the Annex is that while 2(a) has no

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Putting this controversy aside, what is striking is that the IRO Manual does not discuss the Capos' allegedly complicit and persecutory conduct in relation to Part II of the Annex at all, but instead in commentary to Part I, where their status as "victims of the Nazi or Fascist regimes" is called into question. IRO Manual, ch. III, p. 14. This is even stronger evidence that Part II, section 2(a) only applied to persons who would be prosecuted for war crimes, while the question whether a prisoner's conduct in the camps might disqualify him from IRO assistance turned separately upon his status as a "genuine, *bona fide*, and deserving" victim of persecution under Part I. IRO Manual, ch. II, p. 8.

[5] The meaning of the footnote and its relevance to *Fedorenko* is discussed in Stephen J. Massey's *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97, 113-119 (1986), and Abbe L. Dienstag's comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 Colum. L. Rev. 120, 131 n. 39 (1982).

voluntariness *requirement*, as 2(b) plainly does, the term "assisted" appearing at 2(a) must be construed in the same equitable manner as in 2(b), so that evidence of voluntariness and subjective purpose remain *relevant* to the determination of whether an individual's conduct "assisted" the persecution of civilian populations. This reading best harmonizes the various elements of the Annex with its stated purpose.

The above also squares with the common definition of "persecution," it being "the action of pursuing or persecuting a person or group with hostile intent." *Oxford English Dictionary* (2nd ed. 1989); *see also* Petitioner's Brief at 23. Pairing "persecution" with "enemy" in section 2(a) naturally leads one to presume that *all* persons who "assisted the enemy in persecuting civil populations" did so with a meaningful degree of freedom and shared persecutory purpose, thus making it unnecessary to add the qualifier "voluntarily" to "assisted." At the same time, there was good reason to leave the word "voluntarily" out of Section 2(a) because it is overbroad. Including it would have given many persons conscripted by the Nazis but who later furthered Nazi persecution with a meaningful degree of freedom and shared persecutory purpose the chance to assert a blanket defense that because they had not *volunteered* for service in the first instance all of their later conduct on behalf of the Nazis was involuntary. Leaving the term "voluntarily" out of 2(a) advanced the important principle that responsibility for persecution should be assigned based upon evidence of *individual moral culpability*,

and cannot be avoided because one was "just following orders." It makes sense that the IRO constitution's test for measuring assistance to persecution would mirror the famous standard applied to Nazi collaborators at the Nuremberg trials, a standard that also turned on the question of "moral choice."[6]

Congress later superimposed additional eligibility criteria on the "displaced person" definition it adopted from the IRO constitution, but none of these DPA provisions defining "eligible displaced persons" altered the Act's commitment to the underlying IRO scheme for measuring assistance to persecution. The congressional record documents an extensive, heated debate over competing DPA bills[7], but at no point did legislators in the House or Senate ever discuss the specific text of Annex I, Part II or otherwise address the concept of assistance to

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[6] "Principle IV: The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations, 1950.

[7] 94 Cong. Rec. H7727-76 (daily ed. June 10, 1948), H7860-65 (daily ed. June 11, 1948); H8854-63 (daily ed. June 18, 1948; 94 Cong. Rec. S6177-90 (daily ed. May 20, 1948), S6397-407 (daily ed. May 25, 1948); S6444-458 (daily ed. May 26, 1948); S6551-6587 (daily ed. May 27, 1948); S6669-6813 (daily ed. June 1, 1948); S6858-6917 (daily ed. June 2, 1948); S8079-9023 (daily ed. June 19, 1948).

persecution.[8] At several points during debate various legislators expressed their understanding that persons who provided forced labor in Nazi concentration camps would be eligible for visas under the Act. 94 Cong. Rec. S6452 (daily ed. May 26, 1948), S6866 (daily ed. June 2, 1948); 94 Cong. Rec. H7738 (daily ed. June 10, 1948).

The DPA's origins establish that Congress never intended the statute to measure visa eligibility based upon the "objective effects" of an applicant's conduct. Congress instead adopted a definition of assistance that turned on "moral choice." A careful reading of *Fedorenko* reveals that this Court, like Congress, also understood assistance to require individual moral culpability.

III. *FEDORENKO* DID NOT APPLY AN OBJECTIVE EFFECTS STANDARD.

The pertinent DPA provisions do not support the Fifth Circuit's "objective effects" test, and *Fedorenko*—the purported basis for the Fifth Circuit's test—provides no support for the standard, either.

The phrase "objective effects" is found nowhere in *Fedorenko*. It first appeared in the Board of Immigration Appeals (BIA) decision *In re Laipenieks*, 18 I & N Dec. 433, 465 (BIA 1983). *Laipenieks* was not a DPA case, but instead concerned whether a former member of the Nazi-

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[8] *Id.*; *see* Massey, 71 Minn. L. Rev. at 112 -17.

controlled Latvian Political Police was deportable for having "ordered, incited, assisted or otherwise participated in the persecution of any person" under the 1978 Holtzman Amendment, 8 U.S.C. § 1251(a)(19). *Id.* at 463-66. In finding Laipenieks deportable, the BIA held that *Fedorenko* governed the term "assisted" in the new Nazi deportation statute and focused on footnote 34 of Justice Marshall's opinion. *Id* at 464. The BIA rejected as irrelevant Laipenieks's claim that he shared no persecutory motives with the Nazis, pointing to the phrase in the footnote that called for analysis, "*focusing on whether particular conduct can be considered assisting in the persecution of others.*" *Id.* at 464 (emphasis in original) (quoting *Fedorenko*, 449 U.S. at 512 n. 34. (emphasis added by *Laipenieks*)). The BIA italicized this entire phrase, while in the original text of the footnote this Court only emphasized the word "*persecution.*" *Id.* Reading the italicized phrase in isolation, the BIA concluded, "we look not to the respondent's subjective intent, but, rather, to the *objective effect* of his action in deciding whether he assisted in the specified persecution." 18 I & N Dec. at 465 (emphasis in original).

The following year the BIA used *Laipenieks* to affirm the deportation of Fedorenko, whose case had been remanded after the Supreme Court upheld his denaturalization. *In re Fedorenko*, 19 I & N Dec. 57, 69-70 (BIA 1984). Four more years later, the BIA imported its objective effects standard into the separate persecutor bars for asylum, 8 U.S.C. § 1101(a)(42), and withholding of deportation, 8 U.S.C.

§ 1253(h)(2)(A). *In re Rodriguez-Majano*, 19 I & N Dec. 811, 814-15 (BIA 1988). In doing so, the Board clarified the radically narrow scope of its standard, citing *Fedorenko* for the proposition that, "participation or assistance of an alien in persecution need not be *of his own volition* to bar him from relief." *Id* at 814 (emphasis added) (citing *Fedorenko*, 449 U.S. 490). It is this same standard that the BIA has applied since 1988, and that the Fifth Circuit followed below when it held, "[t]he question of whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." *Negusie v. Gonzales*, 231 Fed. Appx. 325, 326 (5th Cir. May 15, 2007) (applying *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003).)

A. The Objective Effects Test Is Premised upon Fundamental Errors of Logic and Interpretation.

The objective effects standard stems from two related errors, the first logical and the second interpretative. *Fedorenko* reasoned that the absence of the term "voluntarily" in the DPA provision excluding those who "assisted the enemy in persecuting civilian populations" and its presence in the twin provision excluding persons who "voluntarily assisted the enemy forces" was clear evidence of congressional intent. 449 U.S. at 512. This Court explained that it would violate basic rules of statutory interpretation to read the first provision "to include a voluntariness requirement that the statute itself does not impose." *Id.* at 512 n.

34. But the fact that voluntariness is not a *requirement* of the first provision does not mean that voluntariness is *necessarily irrelevant* to whether an individual assisted persecution, and much less does it mean that subjective intent must also be irrelevant. This unwarranted leap of reason is the foundation of the objective effects test. *See Laipenieks*, 18 I & N Dec. at 465.

The BIA's logical error then caused the agency to adopt a flawed interpretation of *Fedorenko* at odds with the common meaning of the words "persecution" and "assisting." As Petitioner points out in his brief, Pet.'s Br. at 23, and as amicus noted above, *supra* at 17, the common definition of "persecution" presumes an actor possessing both the agency and purpose to pursue another person. Paired with "persecution" the word "assisting" is most naturally understood to mean conduct performed with a shared persecutory purpose and at least some meaningful degree of freedom. The BIA's notion of "assisting persecution" without intent or volition does not correspond to the ordinary use of those words.

So even when read in isolation, Justice Marshall's call for analysis "focusing on whether particular conduct can be considered assisting in the *persecution* of others" is best understood to describe an inquiry that considers both (1) whether acts of persecution were committed, and, if they were, (2) whether the "particular conduct" of the individual in question was culpable to the degree that he could fairly be deemed to have assisted. The second step of

this inquiry naturally looks to evidence of the individual's subjective intent and the degree to which one's conduct was voluntary—just the opposite of the objective effects test. A careful reading of *Fedorenko* reveals that this Court did in fact weigh evidence bearing on Fedor Fedorenko's intent and the voluntariness of his conduct.

B. In Concluding that Fedorenko Assisted Persecution, this Court Weighed Factors Having No Connection to the "Objective Effect" of his Conduct.

This Court's evaluation of Fedorenko's particular conduct was not limited to its objective effects. In concluding that Fedorenko assisted persecution, this Court noted that he "was issued a uniform and armed with a rifle and a pistol," that "he was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village," and that Fedorenko "admitted to shooting at escaping inmates on orders from the commandant of the camp." *Id.* at 514, n. 34.

It is true that Fedorenko's act of shooting at escaping prisoners and his act of patrolling the camp in uniform while armed had the objective effect of confining and terrorizing inmates. However, this Court did not limit its analysis to those *two* facts. To the contrary, this Court considered evidence that bore no relationship to the persecution suffered by the camp inmates, specifically noting that (1) Fedorenko was paid for his work, (2) he received a

merit stripe, (3) the Russian armed guards outnumbered the German soldiers at the camp, and (4) Fedorenko was able to leave the camp yet always returned. *Id.* Although these facts are objectively verifiable—and in that sense not wholly subjective—they are relevant in that they shed light on the nature of Fedorenko's personal motivation, the degree to which he became a meaningful member of the concentration camp staff, and the degree to which his actions were voluntary, even if he was forcibly recruited to serve as a guard in the first instance.

Under the fairest reading of *Fedorenko*, one must conclude that this Court was concerned not with the objective effects of Fedorenko's conduct, but with Fedorenko's personal *culpability*, which it ascertained by considering the entirety of Fedorenko's conduct and behavior under the circumstances, including evidence that his actions were voluntary to a meaningful degree

C. *Fedorenko* Does Not Hold that Voluntariness Is Irrelevant to Analyzing Assistance to Persecution.

The *Fedorenko* Court held that Fedorenko's "service as a concentration camp armed guard — whether voluntary or involuntary — made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512. But this oft quoted language does not support the proposition that voluntariness is generally irrelevant when assessing whether particular conduct assisted

persecution. The words "whether voluntary or involuntary" are qualified by the equally important words "*service*," "*concentration camp*," and "*armed*." *Id.* Taken in the context of armed service, the term "voluntary" relates not to whether a concentration camp guard furnished a deadly weapon by his Nazi superiors was somehow compelled to perform his duties under immediate conditions of duress, but rather whether the initial decision to serve as a guard was voluntary. Thus, the Court's language actually reflects the view that, although Fedorenko may not have *volunteered* for his position at Treblinka, he and the other camp guards served the Nazis with a degree of freedom that made them personally culpable as assistants to persecution. When the Court used the term "voluntary," it was using it as a synonym for "enlisted" and, when the Court used the term "involuntary," it meant "conscripted" or "forcibly recruited."

It is otherwise clear that the Court did not intend to hold that voluntariness was generally irrelevant to the issue of assistance to persecution. The Court lifted its entire holding, including the clause "whether voluntary or involuntary," from its earlier description of Kempton Jenkins's expert testimony about how the DPA was administered by foreign service officers. *Id.* at 510. Jenkins testified that, based on his experience as a vice consul in Germany reviewing DPA visa applications, "[Fedorenko's] service as an armed guard at a concentration camp — whether voluntary or not — made him ineligible for a visa" under the DPA. *Id.* at 510-11. The Court's holding merely confirmed Jenkins's official

account and addressed the separate issue of whether concealing his service at Treblinka materially affected Fedorenko's original DPA application.

Read in light of Jenkins's testimony, *Fedorenko* more accurately held that regardless of whether one voluntarily enlisted or was forcibly recruited, an individual who thereafter served as an armed guard at a Nazi concentration camp "assisted" the persecution of civilians within the scope of DPA section 2(b) and was ineligible for a visa. The holding does not stand for the general proposition that evidence of voluntariness, motive, or subjective intent are necessarily irrelevant to determining whether an individual assisted persecution.

D. *Fedorenko*'s Culpability Standard Was not Elaborated on Because So Few Nazi Cases Presented Difficult Line-Drawing Problems.

For many years the BIA applied its misguided "objective effects" test in Nazi deportation and denaturalization cases, but its flaws did not produce unjust results because the government pursued Nazi persecutors or collaborators whose acts were clearly as culpable as Fedorenko's. Indeed, the facts of many of these cases were almost indistinguishable from *Fedorenko*. *See, e.g., Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999) (former Nazi willingly served as an armed SS guard at Auschwitz and Sachsenhausen concentration camps); *United States v. Breyer*, 41 F.3d 884, 886 (3d Cir. 1994) (former Nazi joined Waffen SS and served as armed guard at

Buchenwald and Auschwitz death camps); *United States v. Schmidt*, 923 F.2d 1253, 1255 (7th Cir. 1991) (Romanian inducted into German army served as armed concentration camp guard at Sachsenhausen); *Kulle v. INS*, 825 F.2d 1188, 1189 (7th Cir. 1987) (former Nazi joined Waffen SS and served as concentration camp guard and trainer, receiving promotions to ranks of corporal and sergeant); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986) (former Nazi joined SS and served as commander supervising guards at Sachenburg and Dachau concentration camps); *United States. v. Kairys*, 782 F.2d 1374, 1377 (7th Cir. 1986) (Lithuanian recruited by Nazis trained guards and served as guard at Treblinka concentration camp).

Even in slightly different circumstances, the outcomes were equally untroubling, since for the most part, the persecutor and the victims were clearly defined and the acts just as heinous. *See, e.g.*, *United States. v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996) (Lithuanian volunteered to serve in police unit organized by Germans to persecute Jews and was commander in guard unit confining Jews to ghetto where they were subjected to severe persecution); *United States v. Ciurinskas*, 148 F.3d 729, 731 (7th Cir. 1998) (Lithuanian soldier absorbed into German army served in special unit sent on missions to execute thousands of communists, Jews and others); *Kalejs v. INS*, 10 F.3d 441, 442 (7th Cir. 1993) (Latvian soldier joined and served as commander in pro-German military unit carrying out Nazi policy by executing thousands of Jews, Gypsies and others).

Until recently, courts have not had to face the "difficult line-drawing problems" that the *Fedorenko* Court anticipated could arise in other contexts.[9]

IV. THIS COURT SHOULD REJECT THE "OBJECTIVE EFFECTS" TEST.

It is highly questionable whether *Fedorenko* is applicable in the separate statutory context of asylum claims. *See* Petitioner's Brief at I, B. But should this Court determine that *Fedorenko* is relevant to the application of the asylum statute, it should reject the Fifth Circuit's objective effects test. By adopting a narrow view of *Fedorenko* and refusing to consider evidence of individual culpability, the Fifth Circuit permits unjust, inequitable results in hard cases and exhibits a disturbing indifference toward the victims of persecution our asylum laws were meant to protect. It is all the more troublesome that the Fifth Circuit should derive its standard from a case concerning victims of the Nazi death camps, as it treats both deserving asylum seekers and holocaust survivors as morally indistinguishable from their persecutors.

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[9] A very small number of Nazi persecution cases have presented conduct that was less obviously culpable. *See, e.g.*, *Petkiewytsch v. INS*, 945 F.2d 871, 880-81 (6th Cir. 1991); *United States v. Kowalchuk*, 773 F.2d 488, 511-12 (3rd Cir. 1985); *United States v. Sprogis*, 763 F.2d 115, 121 (2d Cir. 1985). The alien in each of these cases was slightly removed from the persecutory acts.

The Fifth Circuit's reading of *Fedorenko* cannot be squared with the text and purpose of the IRO constitutional provisions that Congress incorporated whole into the DPA. *Fedorenko* struck the balance dictated by the terms of the IRO constitution, denying those culpable of assisting the Nazis the technical defense that they had been conscripted and were just following orders, while also protecting demonstrably innocent victims whose forced labor helped drive the machinery of their own persecution. The *Fedorenko* Court understood that an inflexible test could never achieve this balance, and so it adopted a nuanced standard based on personal moral culpability that would allow courts to draw fair lines between persecutors and their victims.

Unlike Nazi denaturalization and deportation cases where courts had no reason to unpack the nuances of the *Fedorenko* test set out in footnote 34, asylum cases do present the difficult line drawing problems *Fedorenko* anticipated. To the extent this Court finds *Fedorenko* relevant in the asylum context, it should clarify the standard set forth in footnote 34 to allow consideration of voluntariness, subjective intent, and other important factors going to personal moral culpability.

A. Most Courts Applying *Fedorenko* in Asylum Cases Have Adopted a Personal Culpability Standard.

As courts have begun to grapple with applying *Fedorenko* to asylum and withholding of removal cases, nearly all have adopted some type of personal

culpability test, recognizing a broad array of circumstances—including voluntariness—as relevant to the analysis of whether particular conduct assisted persecution. The Eighth and Ninth Circuits have applied the broadest "personal culpability" standards, and other Circuits have done so to varying extents.

Over a decade ago, the Second Circuit reasoned that under *Fedorenko*, it seems "clear" that "personal culpability" is required for the denial of asylum on the ground of participation in persecution. *Ofosu*, 98 F.3d at 701. As that test has evolved, the Second Circuit has tended to look to the applicant's "behavior as a whole," including traditionally "subjective" factors. *See Gao v. U.S. Attorney General*, 500 F.3d 93, 99, 103 (2d Cir. 2007) (considering whether applicant had the requisite level of culpable knowledge that his acts would assist in persecution); *Xie v. INS*, 434 F.3d 136, 141, 144 (2d Cir. 2006) (assessing petitioner's voluntariness despite statutory language and "emphatically" leaving open possibility that redemptive behavior may be relevant to whether an applicant assisted in persecution).

The Eighth Circuit expressly adopted a personal culpability test in *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). In *Hernandez*, the Eighth Circuit remanded, finding that the BIA had failed to engage in the "particularized evaluation" of the applicant's conduct required by *Fedorenko*. *Id.* at 813. When faced with hard line drawing problems—such as the Eighth Circuit faced there—*Fedorenko* required that

the IJ engage in a particularized evaluation to determine whether an individual's behavior was "culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution." *Id.*

In its view, such an evaluation necessarily included "all aspects of Hernandez's testimony," including his claim that the persecutory acts were involuntary. *See id.* at 813-14 (faulting BIA for failing to consider Hernandez's uncontroverted testimony that his involvement with the guerillas was at all times involuntary and compelled by threats of death). An analysis of Hernandez's mental state was not only consistent with, but in fact required by, what the Eighth Circuit called *Fedorenko's* "particularized evaluation" language.[10]

The Ninth Circuit in *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) and again in *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 926 (9th Cir. 2006) used *Fedorenko* to require immigration judges to conduct a "particularized evaluation" to assess an asylum applicant's "responsibility for persecution" and to evaluate an applicant's conduct along a "continuum" so as to determine "personal culpability." *Miranda-Alvarado*, 449 F.3d at 926; *Vukmirovic*, 362 F.3d at 1252-53; *see also Riad v. INS*, No. 96-70898, 1998 WL 559348, at *3, *5 (9th Cir. Sept. 1, 1998)

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[10] The Attorney General favorably cited *Hernandez* in *In re A.H.*, 23 I. & N. Dec. 774, 785 (A.G. 2005) without discussing the BIA's objective effects test. *See also* Petitioner's Brief at 49-50.

(requiring IJ to evaluate individual's "personal culpability" along a continuum of conduct to determine if he assisted in persecution). The Ninth Circuit identified two requirements to establish *Fedorenko* "culpability": personal involvement and purposeful assistance. *Miranda-Alvarado*, 449 F.3d at 927. The second requirement, purposeful assistance, factors in the totality of the surrounding circumstances, including the motivation behind the applicant's behavior. *See Miranda-Alvarado*, 449 F.3d at 927, n. 10 (questioning whether actions that result from physical or psychological compulsion or acts accompanied by frequent redemptive behavior could be sufficiently culpable to preclude asylum eligibility); *Vukmirovic*, 362 F.3d at 1252-25 (analyzing whether behavior was undertaken in self-defense).

According to the Ninth Circuit, part of analyzing an applicant's motivation involves assessing the extent to which persecutory behavior is involuntary and participation coerced. *See Miranda-Alvarado*, 449 F.3d at 929 (contemplating some situations so coercive that under a totality of the circumstances analysis, an individual could not be found to have assisted in persecution). In order to achieve a just result in difficult cases and to bar from entry into the United States only those truly "culpable" individuals, *Fedorenko requires* the court to consider voluntariness as part of the "particularized evaluation" of each applicant. *Id.*

Citing *Hernandez* and *Miranda-Alvarado*, the Eleventh Circuit recently adopted a version of the

Fedorenko culpability standard in the case of a Chinese asylum applicant who worked in a forced abortion clinic. *Chen v. U.S. Attorney General*, 513 F.3d 1255, 1259 (11th Cir. 2008). There, the Court held that the standard for determining whether an asylum applicant is ineligible for asylum and withholding of removal due to assistance or participation in persecution is a "particularized, fact-specific inquiry" into whether the applicant's personal conduct was merely indirect or peripheral or if the conduct was active, direct, and integral to the underlying persecution. *Id.* After considering a host of factors, including the voluntariness of the applicant's actions, the court determined that the applicant's conduct as a guard at the family planning facility where forced abortions were performed rose to the "level of culpability" that qualifies as assistance in persecution. *Id.* at 1260.

The Fourth Circuit has also implicitly adopted a personal culpability test. *See Higuit v. Gonzales*, 433 F.3d 417, 421 (4th Cir. 2006) (affirming IJ's decision that Higuit assisted in persecution because there was no dispute over his "personal culpability" in this case). As has the Seventh Circuit. *See Doe v. Gonzales*, 484 F.3d 445, 448 (7th Cir. 2007) (in evaluating whether applicant assisted persecution, considering circumstances under which he was came to engage in persecution and extent to which he understood mission); *Singh v. Gonzales*, 417 F.3d 736, 741 (7th Cir. 2005) (after considering a host of factors bearing both on persecutory acts and on the motivation behind them, considering whether

Singh's conduct was "the type that Congress intended to target" when using the term assisted).

The only Circuit that has outright rejected an evaluation of personal culpability in favor of the BIA's "objective effects" test in asylum and withholding of removal cases is the Fifth Circuit—the court from which Negusie has appealed. All of the other Circuits that have considered a voluntariness or duress defense have recognized that, in these difficult line-drawing cases where the persecutors and persecuted are not so easily identifiable, the persecutor bar must be flexible enough to account for the complex social and cultural dynamics of the modern day. The Fifth Circuit's outdated and unsupported "objective effects" test should be overturned.

B. These Cases Have Identified a Number of Recurring Factors Important to the Culpability Assessment.

The foregoing cases have identified a number of factors relevant to assessing an individual's personal culpability under the persecutor bar provisions. This Court should consider all of these factors in elaborating upon *Fedorenko's* "particularized evaluation" or "personal culpability" test.

Although not exhaustive, some recurring factors include the following:

(1) Voluntariness/duress, *Chen*, 513 F.3d at 1260; *Doe*, 484 F.3d at 448 (considering circumstances under which applicant was brought to assist in persecution); *Miranda-Alvarado*, 449 F.3d at 927 (evaluating extent of physical and psychological compulsion); *Xie*, 434 F.3d at 143 (weighing fact that Xie could quit job at any time); *Hernandez*, 258 F.3d at 813-14 (considering that applicant was forcibly recruited into the organization and supervised while performing persecutory acts);

(2) Shared persecutory motivation, *Miranda-Alvarado*, 449 F.3d at 927-29 (factoring in alien's position within persecutory organization and involvement in planning); *Singh*, 417 F.3d at 740 (weighing absence of acts of disobedience); *Hernandez*, 258 F.3d at 813-14 (considering how often applicant expressed disagreement with the persecutory acts even when closely supervised and under threat of death);

(3) Meaningful membership in persecuting organization, *Chen*, 513 F.3d at 1260 (considering whether applicant was paid for work and degree of involvement in acts); *Miranda-Alvarado*, 449 F.3d at 927-29 (considering length of time involved in persecutory acts); *Singh*, 417 F.3d at 740 (considering length of time involved in persecutory acts and degree of persecutor's remorse or disgust); *Hernandez*, 258 F.3d at 813-14 (considering length of time involved in persecutory acts and whether applicant received payment or reward for engaging in acts);

(4) Directness of involvement in acts of persecution, *Chen*, 513 F.3d at 1260; *Miranda-Alvarado*, 449 F.3d at 927-28; *Singh*, 417 F.3d at 740; *In re A.H.*, 23 I & N Dec. at 784.

(5) Knowledge, *Chen*, 513 F.3d at 1260; *Casteneda-Castillo v. Gonzales*, 488 F.3d 17, 21-22 (1st Cir. 2007); *Doe*, 484 F.3d at 448; *Xie*, 434 F.3d at 143; *In re A.H.*, 23 I & N Dec. at 785.

(6) Redemptive acts, *Chen*, 513 F.3d at 1260, n.4 (questioning whether redemptive acts were mitigating factor); *Doe*, 484 F.3d at 450-51 (considering relevance of redemptive acts); *Xie*, 434 F.3d at 142-43 (considering redemptive acts in light of risk involved to the applicant); *Hernandez*, 258 F.3d at 813-14 (evaluating applicant's attempts to avoid harming others); and

(7) Efforts undertaken to escape (or lack thereof), *Miranda-Alvarado*, 449 F.3d at 927-29; *Singh*, 417 F.3d at 740; *Hernandez*, 258 F.3d at 813-14;

A "personal culpability" test that considers these factors is not only consistent with, but required by *Fedorenko*. Footnote 34 demonstrates that the *Fedorenko* Court did not intend to deny immigration relief to otherwise innocent victims, but rather to devise a workable legal framework to protect them. As demonstrated by the approach taken by many Circuit Courts, *Fedorenko* provides the analytical flexibility to adapt to present circumstances. Analyzing a multitude of factors, instead of focusing solely on "objective effects," has enabled courts to

award relief in an equitable way that honors the letter and spirit of our asylum laws. This Court should reject the Fifth Circuit's rigid test in favor of a flexible framework that will allow courts to equitably rule in asylum cases when faced with nuanced facts where the distinction between persecutor and victim is not always clear.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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